BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Applications For Consent to	)	WT Docket No. 11-65
Transfer Of Control Filed By AT&T, Inc.	)	DA 11-799
And Deutsche Telekom AG	)	File Nos. 0004669383 *et al*.
	)	

PAC-WEST'S REPLY COMMENTS

Michael B. Hazzard
Adam D. Bowser
ARENT FOX LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Tel. (202) 857-6000
Fax (202) 857-6395
Email: hazzard.michael@arentfox.com

Counsel to Pac-West Telecomm, Inc.

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In accordance with the Commission's April 28, 2011 Public Notice issued in this docket, Pac-West Telecomm, Inc. ("Pac-West") respectfully submits these comments in reply to the joint opposition filed by AT&T, Inc. and Deutsche Telekom AG in connection with their applications for the transfer of control of T-Mobile USA's ("T-Mobile") licenses and authorizations to AT&T.[1]

I. INTRODUCTION

Pac-West is a competitive local exchange carrier ("CLEC") that provides interstate and intrastate exchange access service, as well as local, long-distance and enhanced services on a wholesale basis to communication service providers, including the Applicants. These comments address the ongoing anticompetitive practices of T-Mobile that the Commission should address before the carriers' applications for approval to transfer control of T-Mobile's various licenses and authorizations enumerated in the Public Notice are granted. Although Pac-West and AT&T

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1 *See In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, Joint Opposition Of AT&T Inc., Deutsche Telekom AG, And T-Mobile USA, Inc. To Petitions to Deny And Reply To Comments (June 10, 2011) (*Joint Opposition*); *see also In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, Description of Transaction, Public Interest Showing and Related Demonstrations (Apr. 21, 2011) (*Applicants' Public Interest Statement*).

were able to negotiate an agreement covering the termination of intraMTA traffic, T-Mobile continues to refuse to negotiate with Pac-West in good faith while at the same time forcing Pac-West to incur the ongoing cost of terminating T-Mobile's customers' traffic to Pac-West's customers. As discussed below, any approval of AT&T's planned acquisition of T-Mobile should be conditioned on the combined entity abiding by the Commission's rules and regulations mandating that CMRS providers compensate CLECs for the work they perform in terminating their customers' intraMTA traffic.

II. SHOULD THE COMMISSION APPROVE THE MERGER, IT SHOULD REQUIRE THE COMBINED ENTITY TO COMPENSATE CLECS FOR THE USE OF THEIR NETWORKS

As many commenters have recognized, if the Commission approves AT&T's planned acquisition of T-Mobile, the relatively concentrated wireless market will become even more concentrated.[2] As both a customer and a competitor of the Applicants, Pac-West is acutely concerned that the merged entity will simply use its increased market power to further discriminate against smaller CLECs, such as Pac-West, unless the Commission imposes conditions on the merger to produce benefits to consumers and to safeguard competition. These conditions should not only require T-Mobile to cease its anticompetitive and unlawful behavior described below, but also ensure that the merged entity abides by its common-carrier duties going forward.

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2 *See*, *e.g.*, *In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, Petition to Deny of PAETEC Holding Corp., MPower Communications Corp., and U.S. Telepacific Corp., at 5-11 (May 31, 2011); *In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, Petition of Cox Communications, Inc. to Condition Consent, at 2-5 (May 31, 2011).

While other carrier's may point to other concerns with the Applicants' merger, the Commission should be concerned about T-Mobile's refusal to compensate Pac-West and other similarly situated CLECs for terminating its customers' intraMTA traffic. While Pac-West was able to negotiate a traffic-exchange agreement with AT&T Wireless for intraMTA traffic, it remains concerned that the merged entity will simply adopt the "worst practices" of T-Mobile. Without curing T-Mobile's abusive conduct, the merger of AT&T and T-Mobile will not advance the public interest.

The Commission recently reiterated that the costs associated with terminating a call do not vary based upon what type of carrier is sending a call to be completed.[3] As part of this docket, the Commission should therefore put an end to the *de facto* ability of T-Mobile to obtain a different termination rate from CLECs, often $0.00, compared to what it pays ILECs for the same service, or from what CLECs lawfully charge other carriers for the same services.

The Commission has stated repeatedly that "disparate treatment of entities providing the same or similar services is not in the public interest as it creates distortions in the marketplace that may harm consumers."[4] In order to promote competition among all carriers, the Commission should condition the approval of AT&T's acquisition of T-Mobile on the combined entity agreeing to compensate CLECs for the work they perform in terminating intraMTA

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[3] In re *Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing an Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link-Up*, WC Docket No. 03-109, NPRM & FNPRM, FCC 11-13 at ¶ 495 (rel. Feb. 2011) ("NPRM").

[4] *See*, *e.g.*, *In re Matter of IP-Enabled Services*, 24 FCC Rcd. 6039, 6048 ¶ 15 (2009).

traffic.[5] While T-Mobile is quick to cry foul as to the threat of having to pay for the costs CLECs incur to terminate its traffic, this is a carrier that has never paid Pac-West to terminate any of its intraMTA minutes. In the last few years alone, T-Mobile has run of a bill of millions of dollars of termination services and refused to pay for a single minute. Logic – and the Commission's rules – dictates that carriers should be required to pay reasonable compensation before complaining to the Commission about the hypothetical impact such payments might have in the future. The fact of the matter is that AT&T has paid Pac-West to terminate its wireless traffic for years and such routine, relatively de minimis payments have not had a material adverse impact on AT&T.

Wireless carriers such as T-Mobile that have chosen to refuse to make payments are already in violation of the Commission's rules. The Commission already mandates that CMRS providers must compensate CLECs for the work they perform in terminating the CMRS providers' customers' calls. Section 20.11(b)(2) of the Commission's rules states that a "commercial mobile radio service provider *shall pay* reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider."[6] And as the Commission has stated, "[s]imilar types of functions should be subject to similar cost recovery mechanisms."[7] Despite this, T-Mobile refuses to pay either reciprocal compensation or access charges to carriers with whom it does not have a direct contractual relationship, arguing that in the absence of an agreement, a default bill-and-keep arrangement exists. As part of this two-step, T-Mobile then conveniently refuses to

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[5] NPRM ¶ 672.

[6] 47 C.F.R. § 20.11(b)(2) (emphasis added).

[7] *Intercarrier Further Notice*, 20 FCC Rcd 4685, 4702, ¶ 33.

negotiate a termination agreement, and then walks away with free termination. T-Mobile has every incentive simply to refuse to enter an agreement, offer high volume and unlimited calling plans, and continue to reap higher margins off its free ride on CLECs' networks. There is nothing "reasonable" about bill-and-keep arrangements, however, when CLECs like Pac-West are legally obligated to incur the cost of providing service to T-Mobile for years without any compensation, while the ILECs with which Pac-West competes have secured market-based switching rates in excess of $0.01 per minute for the same services.[8]

The Commission should make it clear at every opportunity that its rules continue in effect, that states have the right to set reasonable compensation rates, and to award compensation at those rates consistent with Commission precedent. T-Mobile has seized on every decision and appeal, including the recent MetroPCS appeal to the D.C. Circuit, as a poor and transparent excuse to delay payment on years of past due reciprocal compensation invoices. As the Commission considers this proposed merger, it should make clear that contemplated future revisions and refinements to existing rules cannot legally preclude their ongoing enforcement.

There is also no basis to deny CLECs the same arbitration rights now possessed by ILECs pursuant to the *T-Mobile Declaratory Ruling*.[9] The Commission has previously found this rule change necessary to create regulatory balance in the negotiation process, since CMRS

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[8] *See* Calif. Pub. Util. Comm. D. 06-05-040, Decision Confirming the Assigned Administrative Law Judge's Ruling Granting in Part the Motion for Enforcement of Decision 06-01-043, *Application of Pacific Bell Telephone Company d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996, Application 05-07-024* at 3-4 (May 25, 2006) (approving switching rate for AT&T of $0.0111 per minute).

[9] *In the Matter of Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 (2005) ("*T-Mobile Declaratory Ruling*").

providers could invoke section 252 arbitration procedures against ILECs, but ILECs had no similar recourse against CMRS carriers. Section 332(c)(1)(B) of the Act, however, specifically requires the Commission to "order a common carrier to establish physical connections pursuant to the provisions of section 201" upon "reasonable request of any person providing commercial mobile service."[10] CMRS providers such as T-Mobile therefore have similar leverage over CLECs, and absent a CLECs' ability to compel arbitration before state public service commissions, CLECs will continue to be at a competitive disadvantage to their larger and more entrenched ILEC competitors. Indeed, in the last few years, the percentage of Americans living in a household with at least one cell phone subscription increased from 85% to 89%.[11] In contrast, during that same period, traditional switched access line subscriptions decreased by 13.3%.[12] The amount of traffic that the combined AT&T/T-Mobile entity will send to CLECs will therefore only increase, and the Commission must level the playing field by enforcing existing rules requiring reasonable compensation, and by granting CLECs the same rights vis-à-vis CMRS providers that ILECs now possess.

CONCLUSION

For all the foregoing reasons, the Commission should deny the applications seeking to transfer control over T-Mobile to AT&T unless the Applicants commit to abide by the Commission's rules and regulations and compensate CLECs for the work they perform in terminating intraMTA traffic, which T-Mobile currently refuses to do. AT&T currently pays to

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10 47 U.S.C. § 332(c)(1)(B).

11 Stephen Blumberg & Julian V. Luke, *Wireless Substitution: Early Releases of Estimates form the National Health Interview Survey, January - June 2011*, Center for Disease Control, Table 1 at http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201012.pdf.

12 *Id.*

terminate its wireless traffic; T-Mobile should be required to make payment for years of free termination and abide by similar termination agreements. Commission approval of the proposed transaction could not be lawful absent the imposition of such a condition designed to mitigate public interest harms and to ensure that consumers realize fully the benefits of competition, and competitors who actually abide by the Commission's rules can be assured of a level playing field.

Respectfully submitted,

/s/

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Michael B. Hazzard
Adam D. Bowser
ARENT FOX LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Tel. (202) 857-6000
Fax (202) 857-6395
Email: hazzard.michael@arentfox.com

Counsel to Pac-West Telecomm, Inc.